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No. (1)

In The

Supreme Court of the United States

JEFFREY WHEATON,

Petitioner,

vs.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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May 29, 2008

QUESTIONS PRESENTED

1) Does the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (S 2640) convey jurisdiction for addressing prohibited personnel practices and for the protection of merit system principles to the Merit Systems Protection Board?

2) Does failure to enforce granted discovery constitute a violation of procedural law and prejudice an appellant's position when the case is decided without the appellant having access to any of the requested materials?

PARTIES TO THE PROCEEDINGS

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The opinion of the Court of Appeals for the Federal Circuit (Appendix) has not yet been reported. It is Docket No. 2007-3289. The order for Court of Appeals for the Federal Circuit denying the petition for rehearing and rejecting the suggestion for hearing *en banc* were not reported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on January 11, 2008 and denied the petition for rehearing and rehearing *en banc* on March 24, 2008. 28 U.S.C. § 1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the courts of appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying action was brought by the USDA Natural Resources Conservation Service with an action on October 2, 2006; eliminating the employment benefit of tour renewal travel to Wheaton and other unnamed employees. The statute governing tour renewal travel reads:

> "Under regulations prescribed under section 5738 of this title, an agency shall pay from

> its appropriations the expenses of round-trip travel of an employee, and the transportation of his immediate family, but not household goods, from his post of duty outside the continental United States, Alaska, and Hawaii to the place of his actual residence at the time of appointment or transfer to the post of duty, after he has satisfactorily completed an agreed period of service outside the continental United States, Alaska, and Hawaii and is returning to his actual place of residence to take leave before serving another tour of duty at the same or another post of duty outside the continental United States, Alaska, and Hawaii under a new written agreement made before departing from the post of duty."

5 U.S.C. § 5728(a).

Article I, Article II: Wheaton alleges the decisions denying Merit Systems Protection Board (MSPB) jurisdiction addressing his appeal regarding the matter are contrary to the separation of powers and responsibilities of each Federal government branch as established by the U.S. Constitution:

> "The Congress shall have Power. . . .";
> "To make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or any Depart or Officer thereof,"

U.S. Const., art. I, § 8; "The executive Power shall be vested in a President of the United States of America."

U.S. Const., art. II § 1; and, it is further required that " . . . He shall take Care that the laws be *faithfully* executed," U.S. Const., art. II, § 3 (Emphasis added).

Fifth Amendment: Wheaton asserts that failure to enforce discovery granted in the Acknowledgment Order (AO) prior to issuing the Initial Decision (ID) is not in accordance with procedural law and consequently not in accordance with the Constitution. Discovery is addressed at the MSPB;

> Discovery from a party. A party seeking discovery from another party must start the process by serving a request for discovery on the representative of the other party or the party if there is no representative. The request for discovery must state the time limit for responding, as prescribed in Sec. 1201.*73*(d), and must specify the time and place of the taking of the deposition, if applicable. When a party directs a request for discovery to an officer or employee of a Federal agency that is a party, the agency must make the officer or employee available on official time to respond to the request, and must assist the officer or employee as necessary in providing relevant information that is available to the agency."

5 C.F.R. § 1201.73(a). The Constitutional matter is one of not following due process in the series of actions leading to a dismissal for lack of jurisdiction. Without jurisdiction, the merits are not heard and without an opportunity to bring the merits to consideration, the presence of due process is questionable.

> " . . . nor be deprived of life, liberty, or *property*, without due process of law; nor shall private property be taken for public use without due compensation."

U.S. Const. amend. V (Emphasis added). An employment benefit (tour renewal travel) granted by statute, 5 U.S.C. § 5728(a), is property by virtue of its having value. It is reasonable to consider the travel entitlement a significant and location specific part of the employment compensation package.

STATEMENT OF THE CASE

A personnel action, as defined in the statute describing prohibited personnel practice:

> "a decision concerning pay, *benefits*, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph."

5 U.S.C. § 2302(a)(2)(A)(ix) (Emphasis added), was taken by the NRCS on October 2, 2006. The action was a single page letter and an attached form from a Human Resources Specialist working at the state office level of NRCS. The important sentences in that letter are:

> "In addition, as return rights have been abolished, there is no longer a requirement to sign a travel agreement or tour renewal

> agreement. Therefore, employees will no longer be granted tour renewal travel."

Wheaton v. Merit Systems Protection Board, No. 2007-3289, Appellant Brief, page A-2, A-3 (Fed. Cir. 2008). The letter established an Agency position (policy) which is by all appearances incompatible with 5 U.S.C. § 5278. Further, the letter threatened Wheaton with relocation if he failed to acknowledge the actions of the letter by not returning the form attached to it, "Failure to respond to this notice will result in the agency initiating action to return you to the contiguous U. S.," *Id.* The Agency cited as authority for the personnel action a May 25, 2006 three sentence letter from P. Dwight Holman, NRCS Deputy Chief for Management, abolishing NRCS return rights as granted by Agency personnel policy. The two action sentences of that letter are: "Effective immediately, General Manual – 360, Part 408-90, Return Rights, has been abolished. Return right agreements made prior to May 22, 2006, will be honored." *Wheaton v. Agriculture*, No. SF-3443-07-0042-I-1, Agency Response, Tab 4c (MSPB 2007). The Holman letter does not mention tour renewal travel, service agreements, or statute/Departmental return rights from overseas assignments. It does not mention reassignment. Mr. Holman retired in July of 2006; shortly after authoring his policy letter and well before the agency action regarding tour renewal travel.

Wheaton responded to the Agency with correspondence. That correspondence was copied to the Merit System Protection Board (MSPB) San Francisco office,

Wheaton v. Merit Systems Protection Board, No. 2007-3289 Appellant Brief, pages A-4, A-5 (Fed. Cir. 2008).

The MSPB Administrative Judge (AJ) issued an Acknowledgement Order (AO) on October 17, 2006, which granted Wheaton discovery, ordered the Agency to contact Wheaton regarding settlement and ordered Wheaton to file evidence and argument proving the Agency action was within the Board's jurisdiction, *Wheaton v. Department of Agriculture*, No. SF-3443-07-0042-I-1 (MSPB 2007) at App. 23 to App. 31. Wheaton did so and requested records under discovery. The Agency did not provide the sought records, did not contact him regarding settlement, but did argue against discovery. Wheaton notified the AJ regarding Agency non-compliance with his request, *Wheaton v. Department of Agriculture*, No. SF-3443-07-0042-I-1, Appellant's Brief, pages A-19 to A-21 (MSPB 2007). The AJ did not direct the Agency to comply and did not respond to Wheaton's communication.

Wheaton's response, the October 10, 2006 letter to the Agency, was functionally an appeal to the MSPB;

> "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

5 U.S.C. § 7701(a). After the ID denying jurisdiction, *Wheaton v. Department of Agriculture*, App. 12 to

App. 22, and the affirmation of the ID by the full MSPB in response to Wheaton's petition for Board review, *Id.*, App. 9 to App. 11, Wheaton sought judicial review of the ID from the Court of Appeals for the Federal Circuit:

> "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

5 U.S.C. § 7703(a)(1). Initially the case was erroneously captioned as *Wheaton v. Department of Agriculture*. Wheaton expended considerable resources in writing a brief to address both the merits of the case (as would be appropriate if it were to be versus Department of Agriculture), and jurisdiction for which the respondent would be MSPB. Wheaton did not contest the recaptioning provided that the brief be accepted as written (it was in the mail at the time the motion was received). The case was recaptioned. Counsel for MSPB submitted a respondent's brief and Wheaton replied. The case was decided on January 11, 2008.

Wheaton submitted a petition for rehearing by the panel and for rehearing *en banc*. The intent was to offer the Court of Appeals for the Federal Circuit an opportunity to review the decision in light of constitutional questions that are inherent in the original decision and acts preceding it. Findings by the full MSPB and Court of Appeals for the Federal Circuit did not address the constitutional issues.

On March 11, 2008 the Court of Appeals for the Federal Circuit posted a denial for rehearing and rehearing *en banc* on their website. That denial was entered with a record date of March 24, 2008, *Wheaton v. MSPB*, at App. 23, App. 24.

In accordance with guidance given in the ID, App. 17, and *Wheaton v. Merit Systems Protection Board*, *supra* at App. 7, Wheaton petitioned the Office of Special Counsel (OSC) with his complaint on January 19, 2008. A significant concern was and is that there is already a decision by the Court of Appeal for the Federal Circuit regarding this matter. The decision is that the MSPB has no jurisdiction regarding Wheaton's allegations.

The role of the OSC is investigative and the results of their investigation are reported to the MSPB, 5 U.S.C. § 1212(a). OSC has no independent authority to take action, only to investigate and forward recommendations to the MSPB. MSPB is granted authority to take action under 5 U.S.C. § 1204. The principle of *stare decisis* will prohibit the MSPB from addressing the Agency action regardless of OSC reports and recommendations. Consequently, Wheaton is compelled to petition for writ of certiorari, or else surrender the possibility of relief from the MSPB.

REASONS FOR GRANTING CERTIORARI

The Federal government employs a large number of Americans in a myriad of positions addressing

almost all human endeavors. Employment decisions affecting this vast public resource are governed by many laws, regulations, policies and collective bargaining agreements. One of the most significant pieces of legislation affecting the relationship between those persons who take personnel actions and those who are affected by the actions is the Civil Service Reform Act of 1978, Public Law No. 95-454, 92 Stat. 1111 (S2640) (the "CSRA"). It adopts merit system principles as the dominant philosophy of Federal personnel management:

"FINDINGS AND
STATEMENT OF PURPOSE

Sec. 3. It is the policy of the United States that --,

(1) in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles and free from prohibited personnel practices;

(2) the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct

> which undermines the merit system principles and the integrity of the merit system;
>
> (3) Federal employees should receive appropriate *protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees*;
>
> (4) the authority and power of the Special Counsel should be increased so that the Special Counsel may *investigate allegations* involving prohibited personnel practices and reprisals against Federal employees for the lawful disclosure of certain information and may *file complaints* against agency officials and employees who engage in such conduct";

Civil Service Reform Act of 1978 (CSRA); Pub. L. No. 95-454, 92 Stat. 1111 (S 2640) (Emphasis added). At least one previous decision of the Court of Appeals for the Federal Circuit has cited Congressional intent in support of MSPB jurisdiction. The Court said:

> "'The legislative history of the Civil Service Reform Act of 1978 reveals that the purpose of 5 U.S.C. § 2301(b) (1982) is to protect employees against political coercion, discrimination, personal favoritism and unfair, *arbitrary or illegal action*' S.Rep. No. 95-969, 95th Cong., 2d Sess. 19 (1978); H.R.Rep. No. 95-1403, 95th Cong., 2d Sess. 4 (1978), U.S.Code Cong. & Admin. News 1978, 2723."

Wilburn v. Department of Transp., 757 F.2d 260, 262 (Fed. Cir. 1985) (Emphasis added). The merit system

principles statute is 5 U.S.C. § 2301 and the prohibited personnel practices are enumerated in 5 U.S.C. § 2302. MSPB authorities begin with 5 U.S.C. 7701; OSC authorities and responsibilities are codified at 5 U.S.C. § 1212.

Are actions of the executive branch agencies such as MSPB, and in the early stages of this particular case, U.S. Department of Agriculture, and their interpretation of lower court precedent cases, consistent with the plain meaning of the enacted legislation? It is at least an area of legal ambiguity when examined in light of the Executive branch responsibility, "He shall take Care that the laws be *faithfully* executed," U.S. Const., art. II, § 3 (Emphasis added), and long standing principle of law which this Court recently summarized;

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

Chevron USA Inc. v. Natural Resources Defense Council Inc., 842 U.S. 837, 843 (1984) (Emphasis added).

The regulations governing the MSPB require that, "The appellant has the burden of proof, by a

preponderance of the evidence, with respect to: (i) Issues of *jurisdiction*"; 5 C.F.R. § 1201.56(a) (Emphasis added). Regulations are authored by the agency, therefore it is the MSPB that has established the level of proof necessary to show jurisdiction and have a hearing on the merits. This level is the same as what an agency must reach to sustain a personnel action other than performance based,

> "Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision – (A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or (B) *in any other case, is supported by a preponderance of the evidence.*"

5 U.S.C. § 7701(c)(1) (Emphasis added). The statute is not a product of the agency but is a codification of the enacted legislation.

By hearing this case the Court can answer the following significant questions regarding the actual practices of the MSPB under legislation, statute, and their promulgated rules. Does the equal level of proof required for sustaining an action and to attain access to the MSPB for a hearing based on the merits reflect a faithful execution of the law? Would the level of proof, i.e. preponderance of the evidence, necessary to show jurisdiction justify discovery which would grant Federal employees the right to view pertinent agency records to discern motive? Agency motivation for action is the primary distinction for determining

which law may or may not be applicable regarding jurisdiction, e.g. EEO, or reprisal.

1. ACTIONS OF THE EXECUTIVE BRANCH AND DECISIONS OF THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT AFFIRM THE APPARENT LACK OF MERIT SYSTEMS PROTECTION BOARD JURISDICTION FOR AN APPEAL ALLEGING AN ARBITRARY, ADVERSE AGENCY PERSONNEL ACTION.

This is the more general reason for granting certiorari. The quasi-judicial MSPB is ostensibly the forum where Federal employees bring issues regarding adverse personnel actions based on performance or misconduct, prohibited personnel practices and failure to administer the workforce in accordance with merit system principles. As such, its role as a neutral entity operating between those who initiate and implement personnel actions and those who are subject to them is large. Managers and administrators within the Federal government and their supporting personnel specialists are fully aware of MSPB jurisdictional boundaries. The Court of Appeals for the Federal Circuit has a number of decisions as precedent addressing jurisdiction.

> "Should an employee believe such a prohibited reprisal action has been taken, Congress has provided a direct appeal route to the MSPB, called the Individual Right of Action (IRA), under § 1221. *Absent the benefit of that special provision for whistleblowers,*

> *Spruill would have no right to MSPB review of this particular agency sanction.* Spruill appeals the MSPB's determination that he does not have the benefit of the IRA."

Spruill v. Merit Systems Protection Board, 978 F.2d 679 (Fed. Cir. 1992) (Emphasis added). It is fact that laws having no provisions for enforcement can be disregarded without consequence. MSPB has the power to take disciplinary action:

> "Except as provided in subsection (b), if the Special Counsel determines that disciplinary action should be taken against any employee for having –
>
> (A) committed a prohibited personnel practice, (B) violated the provisions of any law, rule, or regulation, or engaged in any other conduct within the jurisdiction of the Special Counsel as described in section 1216, or (C) knowingly and willfully refused or failed to comply with an order of the Merit Systems Protection Board,
>
> the Special Counsel shall prepare a written complaint against the employee containing the Special Counsel's determination, together with a statement of supporting facts, and present the complaint and statement to the employee and the Board, in accordance with this subsection."

5 U.S.C. § 1215(a).

Congress spoke to the Federal work environment when it adopted merit system principles and required

that prohibited personnel practices be defined. The MSPB, as supported by the investigative activities of, and the ensuing reports and recommendations from the OSC, has been granted authority and power to implement the will of Congress. This petition represents the opportunity for the Court to address MSPB jurisdiction. How much discretion does the MSPB have regarding whether or not they will review the merit of individual appeals? Is that discretion large enough that the MSPB actually has the authority to define its own jurisdiction? How much discretion regarding acting on the recommendations of the OSC is there? Where would the limits of the discretion fall given the Executive branch obligation; " . . . He shall take Care that the laws be *faithfully* executed," U.S. Const., art. II, § 3 (Emphasis added). By allowing this case to be heard, the Court can replace an apparent variety of existing answers with a single interpretation available to the Federal workforce in general, and to the agencies taking personnel actions, the MSPB and to lower courts. Congress will be enlightened regarding the impact of the CSRA (1978) and will be able to compare actual implementation against their intent.

Wheaton asks specifically, "Do allegations of prohibited personnel practices and/or agency actions contrary to merit system principles bring jurisdiction to the MSPB?" The current answer to that is "no" as decided by *Wheaton v. Merit Systems Protection Board*, No. 2007-3289 (Fed. Cir. 2008) at App. 5. It is conveyed with; "The Board's jurisdiction is not plenary, but is limited to those matters of which it has

been given jurisdiction by law, rule, or regulation." *Id.* at App. 5. The Court of Appeals for the Federal Circuit decided that jurisdiction is limited to the twenty one specific items in 5 C.F.R. § 1201.3 and nothing else. This despite Wheaton's assertion that MSPB regulation regarding jurisdiction, " . . . uses the language 'includes.' That language, he avers, leaves the Board's jurisdiction open to other actions as well." *Wheaton v. Merit Systems Protection Board*, No. 2007-3289 (Fed. Cir. 2008) at App. 5. By hearing this case, the Supreme Court will be able to clarify whether or not the regulation regarding jurisdiction, 5 C.F.R. § 1201.3(a), is absolute and limiting or if it serves as a helpful enumeration of most, but not all actions addressable by the MSPB. An action by the Supreme Court can pass judgment on whether 5 C.F.R. § 1201.3 fulfills the MSPB obligation to comply with Congressional intent. This Court can review the MSPB interpretations of the regulation and decide whether or not the interpretations cause actions that satisfy the Constitutional requirement for the MSPB, as an agency under the President, to, " . . . take Care that the laws be faithfully executed." U.S. Const., art. II, § 3.

All three branches of the Federal government have been involved in the broad subject of managing the federal work force. The MSPB maintains by consistent action that their charge is explicit and limited. They frequently allocate significant legal resources to argue against jurisdiction when appeals are outside those distinct and specific instances carried in statute and their authored regulations.

There is no acknowledgement that 5 U.S.C. §§ 2301, 2302, and 7701 convey jurisdiction. The Court of Appeals for the Federal Circuit has affirmed the MSPB position in this instance.

The cases of significant precedence regarding MSPB jurisdiction have primarily been concerned with personnel actions authorized by statutes other than 5 U.S.C. § 7701, which is the principle statute governing what actions may be appealed to the MSPB. If an action can be appealed to the MSPB it follows that the action is within the jurisdiction of MSPB. 5 U.S.C. § 2302(b) lists 12 specific prohibited personnel practices. A number of, but not all prohibited personnel practices have affiliated statutes directly assigning responsibility to MSPB. Addressing those particular prohibited personnel practices has generally been considered to be within the jurisdiction of the MSPB. Jurisdiction is granted for certain acts of reprisal, 5 U.S.C. § 1221 and by 5 U.S.C. 2302 § (b)(8). Individuals alleging discrimination based on illegal criteria may appeal to the MSPB, 5 U.S.C. § 7702 which is also addressed by 5 U.S.C. §§ 2302(b)(1) and (d). Other actions which fall within MSPB jurisdiction are apparently only listed in 5 U.S.C. 2302(b). For example *Id.* at (7) addresses nepotism, *Id.* at (2) for seeking non-merit information regarding applicants, *Id.* at (4), (5), and (6) regarding coercion against competing and considering non-merit criteria, *Id.* at (12) concerning merit system principles. 5 U.S.C. § 2302(b)(12) directly references 5 U.S.C. § 2301 which is the statute defining the merit

system principles; declared as the governing philosophy in the management of the Federal work force. Of particular import to this case is the merit system principle that "Employees should be – (A) protected against *arbitrary action*, personal favoritism, or coercion for partisan political purposes"; 5 U.S.C. § 2301. (Emphasis added). Arbitrary personnel actions would be those not required by directions from a higher authority, not instituted to contribute to the efficiency of the government, or not otherwise driven by a clear motive.

The responsibilities of the three branches of Federal government and how they meet in regards to this case and other similar cases is at issue. Gaps between Congressional intent and Executive branch enforcement may leave room for behavior outside of merit system principles. Wheaton has contended that this is the situation with the Agency denying tour renewal travel, a benefit.

The potential applicability of any decision is very broad because the statute regarding prohibited personnel practices defines personnel actions as, among other things: "(iv) a detail, transfer, or reassignment"; and

> "(ix) a decision concerning pay, *benefits*, or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph";

5 U.S.C. § 2302(a)(2)(A) (Emphasis added). Personnel actions are also defined in MSPB regulation with a listing of 21 specific items. The listing uses the word, "includes," before enumerating them, 5 C.F.R. § 1201.3. These are all very common activities in the Federal workplace. This case is an opportunity for the Supreme Court to examine prohibited personnel practices and whether or not the connection to merit system principles is of sufficient substance to satisfy the will of Congress as expressed in the CSRA of 1978, *supra*. Granting certiorari will bring an opportunity to address the level of specificity in the enacted CSRA of 1978 as the Court did with *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 842 U.S. 837, 843 (1984).

2. THE ROLE OF PROCEDURAL LAW IN GENERAL AND DISCOVERY IN PARTICULAR HAS SIGNIFICANT IMPORTANCE REGARDING THE ABILITY OF AGGRIEVED EMPLOYEES TO ADDRESS QUESTIONS OF MERIT SYSTEMS PROTECTION BOARD JURISDICTION AT THE PREPONDERANCE OF THE EVIDENCE LEVEL REQUIRED.

A second and more specific reason for granting certiorari is the issue of denying discovery and the apparent acceptability of doing so. Jurisdiction represents access to a forum for a hearing of the merits of any given case. As such, its import is as great as any subsequent review of those merits. Discovery allows access to information that may be essential to showing

that a matter is legitimately within the realm of the tribunal. MSPB, is designated as the Agency responsible for addressing employee concerns with management and administration of a very large public resource, the civilian Federal workforce. This is the public business. Accordingly, the Federal government has the highest obligation of any employer to be transparent in policy regarding personnel actions and policy changes. Privacy issues and national security concerns would necessarily overrule the public right to information, but these would not be at issue with a U.S Department of Agriculture NRCS policy regarding tour renewal travel. The Agency action was a change in policy affecting a category of individuals as opposed to specific persons. Wheaton is the only one of the group to contest the matter to this level. The Agency did not comply with Wheaton's request and the AJ did not compel or order them to comply when Wheaton notified him of their failure to do so, *Wheaton v. MSPB*, No. 2007-3289 Appellant's Brief, page A-19 to A-21 (MSPB 2007). At the Court of Appeals for the Federal Circuit, Wheaton cited the lack of discovery enforcement as a matter of procedural law that prejudiced his case, *Id.*, Appellant's Brief pages 28, 29 (Fed. Cir. 2008). He cited the failure to comply with discovery as reason for the Court to remand the case;

> "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be – (1) arbitrary, capricious, an abuse of discretion, or otherwise

> not in accordance with law; (2) obtained without *procedures required by law, rule, or regulation* having been followed; or (3) unsupported by substantial evidence";

5 U.S.C. § 7703(c) (Emphasis added). Counsel for the MSPB addressed the issue, "To the extent that there were any errors before the administrative judge regarding discovery as alleged by the petitioner, he has not shown he was prejudiced or how anything he could have obtained through discovery would have created MSPB Jurisdiction over his appeal." *Wheaton v. MSPB*, No. 2007-3289, Respondent's Brief, page 5 (Fed. Cir. 2008). Wheaton responded with the assertion that proof of damage was required, "No proof of consequences can ever be shown for an action not taken. The best that can be achieved for an action not taken is speculation regarding probable outcomes." *Id.* Reply Brief, page 7. The Court of Appeals for the Federal Circuit decision followed the Respondent's Brief,

> "We also find no error by the Board in failing to order compliance with any discovery requests prior to determining it lacked jurisdiction. There is no reason to believe that additional fact discovery would have any impact on jurisdiction, which is a matter of law."

Wheaton v. MSPB, No. 2007-3289 (Fed. Cir. 2008), at App. 8. Finally, Wheaton addressed prejudice incurred by failure to comply with discovery,

> "Motive is relevant to jurisdiction because actions based on certain motives fall under different statutes. These additional statutes are listed in 5 U.S.C. § 2302, (b)(1), (b)(8), (b)(9), (b)(12), (d)(1), (d)(2), (d)(5), 5 C.F.R. § 1201.3(b)(2) any one of which would affect jurisdiction."

Wheaton v. MSPB, No. 2007-3289, Petition for Rehearing and Rehearing *en banc*, page 11 (Fed. Cir. 2008).

By granting certiorari the Court will be entertaining arguments regarding the role of discovery in MSPB proceedings. An associated issue likely to be brought up during proceedings will be the appropriate level of decision making transparency required of agency managers and administrators. Aside from the national security and individual privacy concerns, is there a need to treat government organizational decision making as confidential? Would the fact that policy actions affect groups of employees as opposed to specific individuals on a case by case basis be a consideration? Discovery procedure at the MSPB is addressed in 5 C.F.R. § 1201.71 and 5 C.F.R. § 1201.73(a).

In this particular case, the actions of the AJ and ensuing decisions have created a "Catch 22" situation. Jurisdiction is required to be proven by a preponderance of the evidence. Jurisdiction is limited to addressing actions with empowering statute outside the three that address the power and function of MSPB and OSC, i.e. 5 U.S.C. § 2301, U.S.C. § 2302, 5 U.S.C. § 7701. Under the current case law, in order to prove

jurisdiction with a preponderance of the evidence, a Federal employee must be able to show some motive such as reprisal. Most evidence that may exist in cases of policy or organizational change, is almost certainly in the possession of the employing agency. Discovery is needed to obtain it. MSPB can deny discovery or if inadvertently granted, can fail to enforce discovery, and require an appellant to prove they were prejudiced by not having access to the records. Unfortunately discovery requests are inherently general in nature, putting appellants in a position where they must prove prejudice with records they can only speculate exist. The aggrieved employees can't prove jurisdiction and consequently the merits are not ever examined. By granting certiorari for this case, the validity of the preceding can be assessed. The current situation has the potential to impact access to the MSPB forum for nearly all cases with the exception of adverse actions based on misconduct or performance. They differ because they are required to state specific facts with the proposal to take action.

CONCLUSION

A reason to grant certiorari in the very largest sense involves a legal concept older than the Republic. Both questions previously discussed are ultimately about the long-standing legal concept adopted into our Constitution from the Magna Carta. All persons are bound to follow the law, including the

President and persons reporting to him and acting on his or her behalf. Their jobs, despite the diversity of them, are to implement the law, " . . . he shall take Care that the laws be faithfully executed." U.S. Const., art. II, § 3. A significant part of the actions of the executive branch involve managing the Federal work force. That too should be done in conformance with the law; legislation, case law, and procedural law. This case is about the interpretation of the legislation and statute by the executive branch, particularly the MSPB, and case law from lower courts. It is about the separation of powers between the three branches of our government.

Respectfully submitted,

JEFFREY WHEATON
337 Clara Road
Toto, GU 96910
(671) 472-1687

Petitioner pro se

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2007-3289

JEFFREY WHEATON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Jeffrey Wheaton, of Toto, Guam, pro se.

Raymond W. Angelo, Attorney, Office of the General Counsel, United States Merit Systems Protection Board, of Washington, DC, for respondent. With him on the brief were B. Chad Bungard, General Counsel, and Rosa M. Koppel, Deputy General Counsel.

Appealed from: Merit Systems Protection Board

Petition for review of the Merit Systems Protection Board in SF3443070042-I-1.

DECIDED: January 11, 2008

Before RADER, Circuit Judge, FRIEDMAN, Senior Circuit Judge, and PROST, Circuit Judge.

PER CURIAM.

Jeffrey Wheaton appeals the final decision of the Merit System Protection Board ("Board") denying his petition for review of the initial decision of the administrative judge dismissing his appeal for lack of jurisdiction. *Wheaton v. Dep't of Agric.*, No. SF3443070042-I-1 (M.S.P.B. June 7, 2007). We *affirm*.

BACKGROUND

Mr. Wheaton has been employed by the U.S. Department of Agriculture ("USDA") since November 11, 1984. On April 7, 1994, he accepted a position as a project engineer in Saipan, Northern Marianas Islands and signed a three-year service agreement. Then, on January 21, 1996, he was selected for a supervisory position in Guam, and he signed a new three-year service agreement. Thereafter, he signed two-year renewal agreements on August 13, 1997; October 13, 2000; March 12, 2003; and June 5, 2005.

Prior to the time that Mr. Wheaton signed his last renewal agreement, Merit Promotion Plan, General Manual ("GM") 360 was in effect. Part 408-90 of GM 360 provided that an employee selected through merit promotion to an assignment in Guam had return rights, i.e., he could return to a similar position within the agency at his same grade level in his designated place of residency, if such a position were available, or otherwise to a position in any of the forty-eight contiguous states. An employee assigned to Guam also received tour renewal travel.

On May 22, 2006, the USDA abolished GM 360, Part 408-90. By letter dated October 2, 2006, the USDA advised Mr. Wheaton that the policy granting return rights was abolished effective May 22, 2006, and that he would only be granted return rights if he exercised such rights immediately upon completion of his two-year renewal agreement and that he must elect to exercise those rights no later than six months prior to expiration of the agreement. The letter stated: "Failure to respond to this notice will result in the agency initiating action to return you to the contiguous U.S." The letter further informed Mr. Wheaton that he would no longer be granted tour renewal travel.

Mr. Wheaton responded with a letter to the Board stating that he refused to sign the form indicating whether he would exercise his return rights or remain in his current position.

The Board treated Mr. Wheaton's letter as a petition for appeal. The administrative judge issued an acknowledgment order stating that Mr. Wheaton appeared to be challenging the USDA's policy on return rights, an action which is not appealable to the Board. The Board then ordered Mr. Wheaton to file evidence and argument to prove that the action was within the Board's jurisdiction.

After Mr. Wheaton filed his submission, the USDA moved to dismiss the appeal for lack of jurisdiction. On January 29, 2007, the administrative judge issued his initial decision dismissing the appeal

for lack of jurisdiction. On June 7, 2007, the Board denied Mr. Wheaton's petition for review and the initial decision became the final decision of the Board.

DISCUSSION

We must affirm the decision by the Board unless we find it to be: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000); *Walls v. Merit Sys. Prot. Bd.*, 29 F.3d 1578, 1581 (Fed. Cir. 1994). The Board's jurisdiction is a matter of law, which we review de novo. *Forest v. Merit Sys. Prot. Bd.*, 47 F.3d 409, 410 (Fed. Cir. 1995).

Mr. Wheaton avers that the Board erred by: (1) requiring that he prove jurisdiction by a preponderance of the evidence; (2) denying jurisdiction despite his allegations that he had been subjected to action appealable to the Board; and (3) failing to enforce discovery and thereby preventing him from obtaining evidence to prove jurisdiction.[1]

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[1] In his opening brief, Mr. Wheaton also argues the merits of his claim ostensibly because the court originally docketed the case with the USDA, rather than the Board, listed as the Appellee. Because subject matter jurisdiction is a threshold matter that must be established before reaching the merits, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-89 (1998), we need not consider these arguments.

The Board's jurisdiction is not plenary, but is limited to those matters over which it has been given jurisdiction by law, rule, or regulation. 5 U.S.C. § 7701(a); 5 C.F.R. § 1201.3(a) (2006); *Garcia v. Dep't of Homeland Sec.*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc). Mr. Wheaton, as the appellant, has the burden of proving that the Board has jurisdiction by a preponderance of the evidence. 5 C.F.R. 1201.56(a)(2)(i); *Garcia,* 437 F.3d at 1330. Although Mr. Wheaton argues that the facts of *Garcia* are distinguishable from the facts here, *Garcia* is binding precedent with regard to the Board's jurisdiction, who has the burden of proving jurisdiction, and the standard of proof required. Hence, we find no error in the Board's determination that Mr. Wheaton bears the burden of proof of jurisdiction by a preponderance of the evidence.

Mr. Wheaton acknowledges that the Board's jurisdiction is governed by 5 U.S.C. § 7701(a). Nevertheless, he argues that the regulation, 5 C.F.R. 1201.3(a), lists twenty possible types of appeals, but uses the language "includes."[2] That language, he avers, leaves the Board's jurisdiction open to other actions as well. The regulation, however, tracks the language of the statute, stipulating that "[t]he Board has jurisdiction over appeals from agency actions *when the appeals are authorized by law, rule, or*

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[2] In fact, the 2006 version of the regulation, in effect at the time of Mr. Wheaton's appeal, lists twenty-one types of appealable actions.

regulation." 5 C.F.R. 1201.3(a) (emphasis added). Notably, following each of the listed appeals, the regulation or statute that authorizes jurisdiction is referenced. Mr. Wheaton cites to no law, rule, or regulation that authorizes jurisdiction over his claim.

His claim appears to be a challenge to the USDA's change in policy regarding return rights. It alleges in part that the statement in the October 2, 2006, letter that "failure to respond to the notice will result in the agency initiating action to return you to the contiguous U.S.," is a threat of adverse action, namely, reassignment. The Board does not have jurisdiction over possible future adverse actions; rather, as explained by the administrative judge, the proper procedure is to petition the Special Counsel. 5 C.F.R. § 1201.2(a); *Alford v. Dep't of Health, Educ. & Welfare,* 1 M.S.P.R. 317, 319 (1980).[3]

Mr. Wheaton's claim also alleges that he was subjected to prohibited personnel practices under 5 U.S.C. § 2302(b) – wherein "personnel practices" are defined in 5 U.S.C. § 2302(a) – by the USDA's threat

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[3] Mr. Wheaton also relies on 5 C.F.R. § 1201.3(c) as a basis for jurisdiction. That portion of the regulation, however, is directed to employees covered by a collective bargaining agreement and provides that such employees may bring an appealable action involving a prohibited personnel practice via not more than one of the following channels: the Board, grievance procedures, or a petition to the Special Counsel. The regulation in no way mandates that all actions alleging a prohibited personnel practice are appealable. Instead, it requires that those actions that are appealable be brought in only a single forum.

of reassignment and change in policy concerning tour renewal travel benefits, in violation of the merit system principles set forth in 5 U.S.C. § 2301(b) and in disregard of 5 U.S.C. § 5728. However, as noted by the administrative judge, the Board does not have jurisdiction over a claim to a prohibited personnel practice under 5 U.S.C. § 2302(b) independent of an otherwise appealable action. *Cruz v. Dep't of Navy,* 934 F.2d 1240, 1245 (Fed. Cir. 1991); *see* 5 U.S.C. § 7701(c)(2)(B) (if agency action is before the Board, prohibited personnel practice may be raised as an affirmative defense). "Congress . . . expressly recognized that not all prohibited personnel practices are appealable to the Board in authorizing the Special Counsel to seek corrective action for patterns of prohibited personnel practices which involve 'matters not otherwise appealable to the Board. . . .'" *Wren v. Dep't of Army,* 2 M.S.P.R. 1, 2 (1980).[4] Nor can an allegation of a violation of a merit system principle under 5 U.S.C. § 2301 provide an independent basis for Board jurisdiction. *Phillips v. Gen. Servs. Admin.,* 917 F.2d 1297, 1298 (Fed. Cir. 1990). Hence, we cannot find that the Board erred in determining that Mr. Wheaton did not establish jurisdiction by a preponderance of the evidence.

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[4] Although Mr. Wheaton also contends that jurisdiction is implied by virtue of the exclusionary phrase in 5 U.S.C. § 2302(e)(2), the court disagrees. That provision pertains to veteran's preference requirements, over which the Board already has jurisdiction, and is not a grant of jurisdiction to the Board.

We also find no error by the Board in failing to order compliance with any discovery requests prior to determining that it lacked jurisdiction. There is no reason to believe that additional fact discovery would have had any impact on jurisdiction, which is a question of law.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Board.

No costs.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEFFREY WHEATON,
Appellant,

DOCKET NUMBER
SF-3443-07-0042-I-1

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: June 7, 2007

Jeffrey Wheaton, Toto, Guam, pro se.

Cynthia D. Davis, Washington, D.C., for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d).

Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be

dismissed. *See Pinat v. Office of Personnel Management,* 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice,* and Forms 5, 6, and 11.

FOR THE BOARD: /s/ Mellissa [Illegible]
for Matthew D. Shannon
Acting Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JEFFREY WHEATON,
Appellant,

DOCKET NUMBER
SF-3443-07-0042-I-1

v.

DEPARTMENT OF AGRICULTURE,
Agency.

DATE: January 29, 2007

Jeffrey Wheaton, Toto, Guam, pro se.

Cynthia D. Davis, Washington, D.C., for the agency.

BEFORE

Glen D. Williams
Administrative Judge

INITIAL DECISION

INTRODUCTION

On October 11, 2006, the appellant filed his petition from the agency's memorandum advising him that the policy of granting return rights to employees hired from the contiguous United States was abolished. Initial Appeal File (IAF). Tab 1. The appellant did not request a hearing. *Id.*

For the reasons set forth below, the appeal is DISMISSED for lack of appellate jurisdiction.

ANALYSIS AND FINDINGS

Background

The appellant is employed as a Supervisory Civil Engineer, GS-0810-13, by the Natural Resources Conservation Service, Department of Agriculture. IAF, Tab 6, Subtab 4d. His duty station is Guam. *Id.*

The appellant was hired by the agency effective November 11, 1984, in the agency's Syracuse, New York, duty station. *Id.,* Subtab 4s. On January 7, 1994, the appellant was selected for a merit promotion in Saipan and he signed a three-year service agreement on April 7, 1994. *Id.,* Subtab 4r. Effective January 21, 1996, the appellant was reassigned to Guam and signed a new three-year service agreement. *Id.*, Subtabs 4p and 4q. The appellant signed two-year renewal agreements on August 13, 1997, October 13, 2000. March 12, 2003 and June 5, 2005. *Id.* Subtabs 4g, 4h, 4n and 4o.

Pursuant to the agency's Merit Promotion Plan, General Manual (GM) 360, Part 408.90(b), employees, such as the appellant, selected through merit promotion, have return rights from an assignment in Alaska, Hawaii, Puerto Rico and Guam. IAF, Tab 6. Subtab 4k. When the employee's tour ends, he is to be returned to a similar position within the agency at his same grade level in his designated place of residency, if a position is available. If no position is available, he was to be placed anywhere in the contiguous 48 states. *Id.* Agency employees earn home

leave in accordance with 5 U.S.C. 6305 and 5 C.F.R. § 630, Subpart F. GM 360, Part 415. Leave.[1] Employees assigned to Guam also receive tour renewal travel. 5 U.S.C. § 5728; 41 C.F.R. Subpart E § 302-1.13.

On May 22, 2006, the agency abolished GM 360, Part 408-90, Return Rights.[2] Return right agreements made prior to May 22, 2006, were to be honored. IAF, Tab 6, Subtab 4c.

On October 2, 2006, the agency advised the appellant that. effective May 22, 2006. the policy granting return rights to employees hired from the contiguous United States was abolished. *Id.,* Subtab 4a. The agency further advised that employees serving a two-year tour extension, such as the appellant, would only be granted return rights if the employee exercises return rights immediately upon completion of the current two-year tour extension. The memorandum further stated that in the future travel agreements and tour renewal agreements would no longer be necessary. *Id.*

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[1] GM 360, Part 415, Leave is not contained in the record. The accrual of home leave under the GM is not in dispute.

[2] The agency's memoranda refer to the return rights being abolished on May 22, 2000. *See* IAF, Tab 6, Subtabs 1 and 4a. I note, however, that the memorandum abolishing the return rights "effective immediately" is dated May 26, 2006. *Id.*, 4c.

The memorandum continued:

> Our records indicate you will complete your latest 2-year tour of service on June 12, 2007. If you choose to remain at your current duty location following expiration of your current tour extension, you will forfeit your return rights. You may remain at your current duty location indefinitely. . . . There is no penalty upon your decision to return to the contiguous United States at a later date. However, you must seek employment through normal Merit Promotion procedures. Also, upon completion of your current tour, you are not authorized tour renewal travel.

Id.

The appellant was advised that he must elect to exercise return rights no later than six months prior to the expiration of his tour. "Failure to respond to this notice will result in the agency initiating action to return you to the contiguous U.S." *Id.*

On October 10, 2006, the appellant responded to the agency's October 2, 2006, copying the Board. *Id.*, Tab 1.

By its acknowledgment order, dated October 17, 2006, the Board advised the appellant that it appeared that he was challenging the agency's policy on return rights for employees hired from the contiguous United States, which is not an action appealable to the Board. *Id.*, Tab 2. The appellant was ordered to

file evidence and argument to prove that this action is within the Board's jurisdiction. *Id.*

On October 27, 2006, the appellant submitted his response to the acknowledgment order. *Id.*, Tab 4. Similarly, on November 3, the agency submitted its response to the acknowledgment order, in which it moved to dismiss the appeal for lack of jurisdiction. *Id.*, Tab 6. The record on the issue of jurisdiction closed on November 11, 2006. *Id.*, Tab 2.

Jurisdiction

The Board's jurisdiction is not plenary but is limited to those matters over which it has been given jurisdiction by statute or regulation. *See* 5 U.S.C. § 7701(a): 5 C.F.R. § 1201.3(a): *Garcia v. Department of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (*en banc*). The appellant has the burden of proving by a preponderance of the evidence that the Board has jurisdiction over his appeal. *See* 5 C.F.R. §§ 1201.56(a)(2)(i); *Garcia*, 437 F.3d at 1330. If an appellant makes a nonfrivolous allegation[3] of jurisdiction, but a determination cannot be made based on the documentary Evidence, the Board should hold an evidentiary hearing to resolve the jurisdictional

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[3] Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a *prima facie* case that the Board has jurisdiction over the matter at issue. *See Ferdon v. United States Postal Service*, 60 M.S.P.R. 325, 329 (1994).

question. *See Coradeschi v. Department of Homeland Security,* 434 F.3d 1329, 1332 (Fed. Cir. 2006); *Garcia,* 437 F.3d at 1344.

Findings

The appellant failed to allege that he was subjected to a personnel action appealable to the Board. The appellant asserts that the October 2, 2006 letter is a transfer or reassignment based on the statement contained therein: "failure to respond to the notice will result in the agency initiating action to return you to the contiguous U.S." IAF, Tab 4. It is unclear whether the appellant's return to the contiguous U.S. would be in a position at the same grade and pay. *See Pierce v. Merit Systems Protection Board,* 242 F.3d 1373, 1375 (Fed. Cir. 2001) ("An employee's transfer to another position at the same grade and pay ordinarily is not an adverse action that the Board has jurisdiction to review under 5 U.S.C. §§ 7512 and 7701."); *see also Walker v. Department of the Navy,* 106 F.3d 1582, 1584 (Fed. Cir. 1997). However, even assuming that the return to the contiguous U.S. would require a reduction in grade and pay, any appeal of that reassignment is premature. The Board does not have jurisdiction over possible adverse actions. *Grant v. Department of the Air Force,* 15 M.S.P.R. 288 n. 3 (1983). In *Alford v. Department of Health, Education and Welfare,* 1 M.S.P.R. 317, 319 (1980), the Board held that the proper course to stop a threatened action is to seek assistance from the Special Counsel.

The appellant asserts that he was subjected to prohibited personnel practices under 5 U.S.C. § 2302(b). The Board, however, does not have jurisdiction over these claims *per se* in the absence of an appealable action. *See Garcia,* 437 F.3d at 1342-43. *citing Cruz v. Department of the Navy*, 934 F.2d 1240, 1245 (Fed. Cir. 1991), *see also Schloss v. Social Security Administration,* 93 M.S.P.R. 344, 355 (2003), *citing, Markon v. Department of State,* 71 M.S.P.R. 574, 578 (1996); *Metzenbaum v. Department of Justice,* 54 M.S.P.R. 32, 36-37 (1992). Therefore, the Board adjudicates such claims only after an appellant establishes that the Board otherwise has jurisdiction over the appeal of an adverse action. *See Schloss,* 93 M.S.P.R. at 355. In this case, the appellant has failed to make a nonfrivolous allegation of Board jurisdiction over his appeal; therefore, there is no pendent jurisdiction over his claim of prohibited personnel practices and race discrimination.

Accordingly, I find the appellant has not raised a nonfrivolous allegation relating to any matter within the Board's jurisdiction and this appeal therefore must be DISMISSED.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: /s/ Glen D. Williams
Glen D. Williams
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on ***March 5, 2007***, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, N.W.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's *Rules of Practice*, and Forms *5*, *6*, and *11*.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WESTERN REGIONAL OFFICE

JEFFREY WHEATON,
Appellant,
v.
DEPARTMENT OF AGRICULTURE,
Agency.

DOCKET NUMBER
SF-3443-07-0042-I-1
DATE: October 17, 2006

ACKNOWLEDGMENT ORDER

This office has received the appellant's petition for appeal. A copy of the appeal is being sent to the agency with this Order. I am the administrative judge assigned to this appeal.

I **ORDER** the parties to follow the procedures set out in the separate notices below. If any party fails to follow my orders or the Board's regulations, I may impose sanctions pursuant to 5 C.F.R. § 1201.43. If either party has a question regarding any aspect of the case processing instructions set forth in this order, he or she may seek clarification from me at the phone number listed at the end of this order.

NOTICE TO APPELLANT

INTRODUCTION

If your appeal is timely filed, and within the Board's jurisdiction, you have the right to a hearing

on the merits of your case. If you requested a hearing, I will schedule a hearing for you. If you did not request a hearing, you have 10 calendar days from the date of this Order to file a written request for one. If you do not request a hearing, you waive your right to one. In that event, you and the agency will be given an opportunity to make written submissions before the record on your appeal closes.

JURISDICTION

It appears you are challenging the agency's policy on return rights to employees hired from the contiguous United States, which is not an action appealable to the Board. In the event you are removed from your position as a result of the policy, or if an adverse action is taken against you because of your failure to respond to the agency's notice regarding return rights, the Board may then have jurisdiction.

You have the burden of proving that the Board has jurisdiction over your appeal. Accordingly, I **ORDER** you to file evidence and argument to prove that this action is within the Board's jurisdiction. Your submission must be filed within 15 calendar days of the date of this Order. The agency may file a response on this issue within 25 calendar days of the date of this Order. Unless I notify you to the contrary, the record on this issue will close on that date. No evidence or argument on the jurisdictional issue filed after the close of record will be accepted unless you

show that it is new and material evidence that was unavailable before the record closed.

DESIGNATION OF REPRESENTATIVE

You may name a representative. If you already have a representative, you must fill out the enclosed "Designation of Representative" form and file it with the Board and with the agency within 10 calendar days of the date of this Order unless you have included your representative's name, address, telephone number, and signature in your appeal. If your representative has filed the appeal for you and you have not personally signed the appeal or submitted a signed "Designation of Representative" form, you also must file a signed "Designation of Representative Form" with the Board and with the agency within 10 calendar days of the date of this Order. If you name a representative after receiving this Order, fill out the enclosed "Designation of Representative" form and file it with the Board and the agency **immediately** after obtaining your representative.

You must **immediately** notify the Board and the agency in writing of any changes in the name, address, or telephone number of your designated representative.

If you register as an e-filer (see information below), you can use electronic filing to file a Designation of Representative, or to notify the Board of a change in contact information.

SETTLEMENT

I have directed the agency to contact you within 35 calendar days of the date of this Order to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. You must discuss concrete, specific settlement proposals with the agency unless either party concludes in good faith that no compromise of any kind is possible. You must also be prepared to discuss with me the status of your settlement discussions.

If you agree to settle your appeal, and you enter the agreement into the record, the Board will retain the authority to enforce its terms. However, if you do not enter the agreement into the record, the Board will have no authority to enforce the agreement.

DISCOVERY

Discovery is the procedure you may use to learn of any facts, documents, or other evidence the agency has that may be helpful to your case. If you wish to engage in discovery, initial requests or motions must be filed within 25 calendar days of the date of this Order. Responses to initial discovery requests must be filed promptly but no later than 20 days after the date of service of the other party's discovery request or the MSPB order. Unless you are filing a motion to compel, you must not submit your discovery requests and responses to the Board. If you do, they will be

rejected and returned to you. The procedures used for discovery are at 5 C.F.R. §§ 1201.71-.85.

It is the policy of the Board to decide an appeal within 120 calendar days of receipt. The Board expects all parties to assist in the expeditious processing of this case by honoring requests for relevant documents and producing material witnesses without additional Board intervention.

RESPONSE TO MOTIONS

You may file a response or objection to any motion filed by the agency. Unless otherwise specified by me or the Board's regulations, your response or objection must be filed with this office and served upon the agency within 10 calendar days of the date that appears on the agency's certificate of service. I will reject any untimely response or objection unless you show good cause for the delay in filing.

GENERAL INSTRUCTIONS

Pursuant to 5 C.F.R. § 1201.26, all submissions filed with the Board must be:

(1) Legible and on 8½- by 11-inch paper;

(2) *All* documents *within a tab* must have new page numbers (by hand if necessary) so that each document, *within each tab,* is re-numbered, from the first page of the first document to the last page of the last document. This will allow for

specific page references to the record, by tab and by page number within a tab. The new page numbers should be placed in the bottom right-hand margin of each page. If some pages within a tab are already numbered in the bottom-right margin, parties should place the new page numbers just to the right of the original page numbers.

(3) Served upon (personally delivered, mailed or faxed) opposing parties and their representatives;

(4) Filed by the date set by me or the Board's regulations. The date of filing is the date your submission is postmarked, faxed, or the date of receipt if you personally deliver it to the Board's regional office; and

(5) Accompanied by a certificate of service stating (a) the names and addresses of the parties served; (b) whether service was by mail, fax, or by personal delivery; and (c) the date of service.

A certificate of service is attached to this Order and lists the names and addresses of the parties who must be served in this case. The attached certificate of service constitutes a model which you may follow in preparing your own certificate of service. *The Board may reject a submission that does not have a certificate of service.* If you register as an e-filer, a

certificate of service will be prepared automatically as part of the pleading you file online.

Extensions of filing dates will only be granted if requested in writing and if good cause is shown. A continuance of a hearing date will be granted only if requested in writing and if you are able to show extraordinary circumstances.

ELECTRONIC FILING

Pursuant to 5 C.F.R. § 1201.14, a party or representative who registers as an e-filer may file and receive documents in electronic form. Such registration and filing can be done at the Board's e-Appeal site (https://e-appeal.mspb.gov). More information about electronic filing is attached to this order.

REGULATIONS

For more detailed information on these procedures, you should refer to the Board's regulations in 5 C.F.R. Part 1201. The regulations are available for review in agency personnel offices, law libraries, some large public libraries, and at the Board's website (http://www.mspb.gov/title5.html).

NOTICE TO AGENCY/INTERVENOR AGENCY RESPONSE

I ORDER the agency to read, comply with, and/or respond to any and all portions of the "Notice

to Appellant" which are applicable to it. I also **ORDER** the agency to serve me, appellant, and appellant's representative (if applicable), with the material listed on the enclosed schedule and any other information required by 5 C.F.R. § 1201.25 within 20 calendar days of the date of this Order.

DESIGNATION OF REPRESENTATIVE

The agency must designate a representative. **I ORDER** the agency to file the name, address, and telephone number of the person authorized to act for the agency on the enclosed "Designation of Representative" form within 20 calendar days of the date of this Order. The representative must have authority to settle this appeal or be able to directly reach someone with that authority on short notice.

SETTLEMENT

I DIRECT the agency to contact the appellant within 35 calendar days of the date of this Order to define the issues, agree to stipulations, and discuss the possibility of settlement. I am available to assist in the discussions. The agency must discuss concrete, specific settlement proposals with the appellant unless either party concludes in good faith that no compromise of any kind is possible.

The agency must also be prepared to discuss with me the status of its settlement discussions.

/s/ Glen D. Williams

Glen D. Williams
Administrative Judge
Western Regional Office
250 Montgomery Street,
Suite 400
San Francisco, CA 94104-3401
Phone: (415) 705-2935
Fax: (415) 705-2945
V/TDD (800) 877-8339

Enclosures

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-3289

JEFFREY WHEATON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

Petition for review of the Merit Systems Protection Board in SF3443070042-I-1.

ORDER

(Filed Mar. 17, 2008)

A combined petition for panel rehearing and for rehearing en banc having been filed by the Petitioner, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 24, 2008.

FOR THE COURT,

Jan Horbaly/JB
Jan Horbaly
Clerk

Dated: 03/17/2008

cc: Jeffrey Wheaton
Raymond W. Angelo

WHEATON V MSPB, 2007-3289
(MSPB – SF3443070042-I-1)